

IN RE: BLUE CROSS BLUE SHIELD
ANTITRUST LITIGATION
(MDL No. 2406)

This document relates to all cases.

First, BCBS-AL as a matter of law cannot waive privilege as to the significant number of documents on its privilege log where the privilege is shared by multiple defendants under the common interest doctrine. Indeed, “the case law is clear that one party ... cannot unilaterally waive the privilege for other holders.” *United States v. Gonzalez*, 669 F.3d 974, 982 (9th Cir. 2012); *see also United States v. BDO Seidman, LLP*, 492 F.3d 806, 817 (7th Cir. 2007) (holding that the “privileged status of communications falling within the common interest doctrine cannot be waived without the consent of all of the parties”). This Court and its privilege Special Master have found numerous instances of common interest between BCBSA and the Plans. *See, e.g.*, Doc. 1935 at 5-7, 9, 14-16, 22 (BCBS-AL Report & Recommendation upholding privilege on nine documents that include communications between BCBS-AL, BCBSA, and/or the Plans on

common interest grounds); Doc. 1917 at 9 (finding document prepared during the course of *Thomas* litigation privileged and subject to common interest); Doc. 2014 at 11 (noting common interest among BCBSA and Plans in analyzing license agreement “within the contours of the law”); Doc. 1485 at 11 (finding common interest applicable to antitrust compliance document prepared by jointly retained outside counsel); Doc. 1884 at 14, 17, 33, 35-36 (upholding privilege of certain communications among Blue Plans through the Legal Department Cooperative).

BCBS-AL’s privilege log lists numerous privileged documents shared among the defendants pursuant to a common interest. For example:

Common Interest Protected Material	Exemplar Entries from BCBS-AL Privilege Log
MDL Litigation Analysis	<ul style="list-style-type: none"> ▪ Document 7208694 entitled “In re BCBS Antitrust Litigation - Joint Defense Meeting - 2-12-2013.pdf” ▪ Document 6808666 entitled “FW: In re BCBS Antitrust Litigation: Draft dismissal outlines” ▪ Document 7901542 entitled “DRAFT - Brief Joining MDL Transfer and Coordination Motion - 9-21-2012”
MDL Mediation Material	<ul style="list-style-type: none"> ▪ Document 580004396 entitled “In re BCBS Antitrust Litigation - 2015 10 28 Defendants’ Mediation Update” ▪ Document 580004398 entitled “10-26-2 PM Draft Mediation Statement Update” ▪ Document 580004747 entitled “2016 02 18 Draft Term Sheet”
Prior Litigation Materials	<ul style="list-style-type: none"> ▪ Document 3401370 entitled “Thomas - Settlement Agreement June 6 draft redlined against September 19 draft (2)” ▪ Document 4810821 entitled “BCBSA-Thomas-Brief in PDF”
Joint Retention Materials	<ul style="list-style-type: none"> ▪ Document 5100985 entitled “Memo - HIPAA and State Privacy Laws Regarding Sharing of PHI Between Control and Par Plans” prepared by outside counsel Miller & Chevalier during the course of joint retention

Common Interest Protected Material	Exemplar Entries from BCBS-AL Privilege Log
	<ul style="list-style-type: none"> Document 7208653 entitled “Final Memorandum on EHB, Actuarial Value, and Accreditation” prepared by outside counsel Miller & Chevalier during course of joint retention analyzing certain aspects of the Patient Protection and Affordable Care Act

None of the defendants have waived privilege over these and other documents they shared pursuant to their common interest. Plaintiffs’ attempt to obtain these documents based on a purported waiver by BCBS-AL should be rejected.

Second, the draconian result of wholesale waiver that plaintiffs seek would unquestionably cause undue prejudice to all defendants. A finding of waiver could lead to the production of not only material protected by common interest, but also thousands of internal BCBS-AL communications that would prejudice the other defendants’ ability to defend the case brought against them. For example, a waiver finding likely would result in the production of internal BCBS-AL communications regarding this MDL and defendants’ mediation efforts and internal legal analysis of the BCBSA license agreements and rules that plaintiffs challenge.

Contrary to plaintiffs’ bold assertion that their requested relief—a finding of wholesale waiver—“is typical,” courts are reluctant to find waiver because “waiver of privilege is the most extreme sanction that a court can impose.” *Jones v. Am. Gen. Life & Accident Ins. Co.*, 2002 WL 32073037, at *6 (S.D. Ga. Dec. 4, 2002) (citation omitted); *see also Henderson v. Holiday CVS, L.L.C.*, 2010 WL 11505169, at *1 (S.D. Fla. Sept. 24, 2010) (explaining that waiver is “an extreme sanction, too harsh under the circumstances”); *Sajda v. Brewton*, 265 F.R.D. 334, 338-39 (N.D. Ind. 2009) (“Even where a privilege log is inadequate, the sanction of waiver for all purportedly privileged documents is severe. Such sanctions are disfavored absent bad faith, willfulness, or fault.”) (citation omitted); *United States v. British Am. Tobacco (Invs.) Ltd.*, 387 F.3d 884, 891

(D.C. Cir. 2004) (“As the federal rules, case law and commentators suggest, waiver of privilege is a serious sanction....”) (citation omitted). Indeed, even cases plaintiffs cite in support of their request confirm that a finding of waiver is harsh and disfavored. *See United States v. Louisiana*, 2015 WL 4619561, at *6 (M.D. La. July 31, 2015) (“[W]aiver is the most extreme sanction that a court can impose....”) (quotation marks omitted); *Williams v. Taser Int’l, Inc.*, 274 F.R.D. 694, 698 (N.D. Ga. 2008) (“Waiver of privilege is the most extreme sanction that a court can impose....”) (quotation marks omitted). The Court should be particularly wary of finding waiver here, where the privilege of other defendants is implicated, and the production of all privileged documents would adversely impact their ability to defend this litigation.

CONCLUSION

For the foregoing reasons, and those set forth in BCBS-AL’s opposition brief, plaintiffs’ motion for the extraordinary remedy of wholesale waiver of privilege over documents on BCBS-AL’s privilege log should be denied.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2018, the foregoing was electronically filed with the Clerk of Court using the CM/ECF system which will send notification of such filing to all counsel of record.

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